

# Message in a Bottle

Linda Hamilton Krieger<sup>†</sup>

## INTRODUCTION

In the late 1970s, when I was a new lawyer in San Francisco, some of my friends from law school were in a Marxist study group. Not me. I found theory tedious and gravitated toward praxis. I organized a tenants' union, went to Ricky Sherover-Marcuse's unlearning racism workshops,<sup>1</sup> and joined a Title VII<sup>2</sup> study group. Yes, there was a Title VII study group in San Francisco in 1978.

My Marxist friends tolerated the tenants' union. They criticized (though not without affection) the "bourgeois subjectivity"<sup>3</sup> of Sherover-Marcuse's unlearning racism work. But they denounced the Title VII study group as flat-out counterrevolutionary.

To me though, the three felt seamlessly of one cloth. I believed then, as now, that the achievement of our collective freedom requires both the inward-facing cultivation of emancipatory consciousness<sup>4</sup> *and* the outward-facing transformation of structures, practices, and social meanings that freeze us into

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†. Professor of Law, University of Hawai'i at Mānoa, William S. Richardson School of Law. This essay is dedicated to the late Ricky Sherover-Marcuse. May her memory be for a blessing.

1. For a description of Sherover-Marcuse's work, see UNLEARNING RACISM, <http://unlearningracism.org> (last visited Oct. 1, 2017). For Sherover-Marcuse's own account of the theoretical foundations of her work, see ERICA SHEROVER-MARCUSE, EMANCIPATION AND CONSCIOUSNESS: DOGMATIC AND DIALECTICAL PERSPECTIVES IN THE EARLY MARX (1986).

2. 42 U.S.C. §§ 2000e–2000e-17 (2012).

3. Philosopher Robert Pippin describes the "bourgeois subjectivity" of the modern West as the notion that the individual person is an independent, rational unit capable of acting consciously and autonomously in light of rational self-reflection. See ROBERT B. PIPPIN, THE PERSISTENCE OF SUBJECTIVITY: ON THE KANTIAN AFTERMATH 2–3 (2005). Subjective (what we would now call "psychological") inquiry by the revolutionary was suspect in most Marxist theory. The idea here was essentially that the subjective "journey inward" would necessarily stunt the development of revolutionary consciousness because, under conditions of modern capitalism, personal identity (Ego) had been commodified. In focusing on the self, a potential revolutionary would inevitably succumb to the fetishism produced by this commodification, creating a pseudo-revolutionary counterculture that would simply become part of the established order. See HERBERT MARCUSE, MARXISM, REVOLUTION AND UTOPIA 511–13 (Routledge 2015).

4. See MARCUSE, *supra* note 3, at 511–13 (explaining the concept of "emancipatory consciousness").

stratified groups from which we can be more easily manipulated and controlled. I believed then, as now, that public law<sup>5</sup> can play a role in this transformational work, but that without continued support from a sustained social movement,<sup>6</sup> transformative law is easily captured and repurposed by powerful interest groups to reinforce the very attitudes, norms, and institutions the law was originally enacted to displace.<sup>7</sup>

But back to San Francisco. A pair of Prairie Fire<sup>8</sup> infiltrators incinerated the tenants' union. Ricky Sherover-Marcuse died too young in 1988.<sup>9</sup> Within a decade, her unlearning racism workshops, geared to encourage the growth of emancipatory consciousness and lead people to embrace revolutionary action,<sup>10</sup> had been replaced by corporatized "diversity trainings" deployed not to help people unlearn racism and similar divisive ideologies, but to help employers avoid discrimination liability.<sup>11</sup> In short, things changed. But I

5. See *infra* text accompanying notes 118–19 (discussing what I mean here by "public law").

6. For ease of reference, I sometimes refer to movements of this sort as "the Movement." Of course, there was not *one* movement, but many: the labor movement, the African-American civil rights movement, the anti-war movement, the gay liberation movement (and its alphabet progeny), and many others. Common among them and of consequence here is that they all sought to destabilize, displace, and transform social norms, institutionalized practices, and social meaning systems. They did this through the elaboration of theory, protests, organizing, legal reform, raising social and political consciousness, and building new organizations, institutions, and meaning systems through "liberatory praxis"—action, informed by theory, that is designed to eliminate oppression and conduce human flourishing.

7. See Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AM. J. COMP. L. 89 (1999); Linda Hamilton Krieger, *Sociolegal Backlash*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 340–93 (Linda Hamilton Krieger ed., U. of Mich. Press 2003).

8. The Prairie Fire Organizing Committee was the "legal arm" of the Weather Underground, founded after publication of the Weather Underground's book-length manifesto. See *Prairie Fire: The Politics of Revolutionary Anti-imperialism: The Political Statement of the Weather Underground*, PRAIRIE FIRE DISTRIBUTING COMMITTEE (1975), [https://ia801506.us.archive.org/15/items/PrairieFire\\_20170422/Prairie-fire.pdf](https://ia801506.us.archive.org/15/items/PrairieFire_20170422/Prairie-fire.pdf). To get a sense of the nature and activities of the PFOC in San Francisco in the late 1970s, see PRAIRIE FIRE ORGANIZING COMMITTEE (1977), [https://freedomarchives.org/Documents/Finder/DOC515\\_scans/515.PFOC.LA5arrest.statement.pdf](https://freedomarchives.org/Documents/Finder/DOC515_scans/515.PFOC.LA5arrest.statement.pdf) (responding to the arrest of its and the Weather Underground's activists at an International Women's Year Convention in late 1977).

9. Sherover-Marcuse, 49; *Ran Group Encounters*, N.Y. TIMES (Dec. 22, 1988), <http://www.nytimes.com/1988/12/22/obituaries/sherover-marcuse-49-ran-group-encounters.html> (last visited Oct. 1, 2017).

10. See Sherover-Marcuse, *supra* note 1.

11. Lauren B. Edelman has written extensively about how, during the 1980s and 1990s, large organizational employers substituted the discourse of "diversity" for the discourse of civil rights, integration, and women's liberation. See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. OF SOC. 1589 (2001). In her most recent work, Edelman demonstrates how that discursive turn to "diversity" was accompanied by the replacement of affirmative action practices (i.e., utilization analysis, critical self-examination to identify barriers to women's and minority advancement, and the use goals and timetables to reach parity between availability and utilization of under-represented groups) with largely ineffective "symbolic indicia of compliance" with equal employment opportunity law, such as anti-discrimination policies, grievance procedures, and diversity training. See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016). In her recent book, Tristin K. Green notes that, "[a]side from formal nondiscrimination

guess it would be fair to say that I stayed in the Title VII study group, because forty years later, here I am near the end of an entire career spent studying, litigating under, teaching, arguing, and writing about this good law.

Sadly though, for at least the past five of those years, I have not been able to imagine beginning another scholarly project about federal employment discrimination law without morbidly entitling it “The Death of Title VII.”<sup>12</sup> Since the early years of the Reagan Administration, the array of antidiscrimination doctrines,<sup>13</sup> executive orders,<sup>14</sup> special area affirmative action plans,<sup>15</sup> and judicial rules and procedures conducive to rights mobilization,<sup>16</sup> which invigorated a broad federal civil rights project, have

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policies and grievance processes, diversity training is the most popular diversity measure adopted by organizations today, alongside measures designed to insulate managerial decisions from bias.” See TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 4 (2017). Validating Green’s claim, sociologist Frank Dobbin reports that, by 1997, nearly half of employers offered some form of diversity training. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 149 (2009).

12. For brevity, I sometimes use “Title VII” to refer not only to the specific federal civil rights statute, but others as well, including the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621–633(a)), Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d–2000d-4a), Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681–1688), and certain Reconstruction Era Civil Rights Acts (particularly 42 U.S.C. §§ 1981, 1983).

13. I refer here to disparate impact theory and comparable worth theory. See *infra* Part II.

14. See, e.g., Exec. Order No. 11246, 3 C.F.R. § 339 (1964–1965) (obligating government contractors not to discriminate, requiring contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin,” and asserting that affirmative action includes, but is not limited to, “employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship”); Exec. Order 11375, 3 C.F.R. § 684 (1966–67) (adding the term “sex” to the bases of protection covered by the Order).

15. In the latter half of the 1960s, the Office of Federal Compliance Programs of the Department of Labor issued a series of special area plans to increase minority hiring in the construction trades, specifically into jobs on large public infrastructure projects receiving federal funding. In particular, the 1969 Philadelphia Plan became a model for voluntary affirmative action programs in private businesses and government agencies. The plan involved completing a “utilization analysis” to determine the percentage of minorities and women available in the relevant labor market, setting goals for minority and women’s employment based on availability, identifying and removing barriers to entry for women and minority workers, and developing recruitment channels calculated to reach women and minorities. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 136–39 (1996); Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, *SEX DISCRIMINATION IN THE WORKPLACE* 297, 303–05 (Faye J. Crosby et al. eds., 2007).

16. During the 1960s and 1970s, both the Federal Rules of Civil Procedure and federal statutes providing successful civil rights plaintiffs with a right to attorneys’ fees conduced the successful mobilization of civil rights protections, including those provided by Title VII. However, on both sides of the millennium, developments in federal standards for grants of summary judgments under FED. R. CIV. P. 56 and dismissals for failure to state a claim upon which relief could be granted under FED. R. CIV. P. 12(b)(6) made effective mobilization of civil rights protections more difficult. See, e.g., Patricia W. Hatamayer, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) (finding that the odds of plaintiffs having their cases dismissed for failure to state a claim upon which relief can be granted were significantly higher under a *Twombly/Iqbal* analysis than under the standard previously provided in *Conley v. Gibson*); Victor D. Quintanilla, *Beyond Common Sense: A*

suffered one judicial or executive insult after another. As a net result, Title VII still functions as a species of statutory tort,<sup>17</sup> but its effectiveness as an engine of gender and racial integration has all but collapsed. In fact, by the time I was asked in the fall of 2016 to write on the future of employment discrimination law under what many assumed would be a Hillary Clinton administration, it seemed to me that things—at least for Title VII—could not possibly get much worse.

Then Donald Trump was elected President. And as this article goes to press, the Senate still lies in Republican control, and the Supreme Court has, in Neil Gorsuch and Brett Kavanaugh, two new, young, and very conservative associate justices.

I still remember the day in 1967 when I first heard the Reverend Doctor Martin Luther King, Jr. say in a newsreel my eighth-grade English teacher

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*Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011) (finding a similar effect in cases alleging race discrimination); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000) (demonstrating not only an increase in the incidence of grants of summary judgment beginning in the mid-1980s, but also that the increase was associated with a judicial tendency to view as questions of law, rather than as questions of fact, issues relating to states of mind, such as the presence or absence of discriminatory intent); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 727–29 (2007) (summarizing research regarding increasing use of summary judgment cases in civil rights cases during the latter part of the twentieth century).

17. Numerous legal scholars have written about the “tortification” of Title VII and other laws prohibiting discrimination in employment. See, e.g., Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721 (2016) (criticizing the importation of tort principles into employment discrimination jurisprudence); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014) (examining the rise of tort principles in the interpretation of employment discrimination statutes in and beyond the late 1980s); Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1316 (2014) (lamenting that “Title VII has been reshaped from an enterprise liability scheme to a ‘statutory tort,’ capable of redressing a limited number of wrongs done to individual employees, but largely incapable of achieving Title VII’s broad purpose of deterring and eradicating workplace discrimination”); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013) (arguing that too much tort law has been incorporated into Title VII); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012) (same); Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 193–97 (1993) (arguing that the transformation of Title VII claims into a species of tort was part of a broader “privatization” of claims under the statute); Gary Minda, *Employment Law*, 41 SYRACUSE L. REV. 265, 307 (1990) (observing that the Supreme Court’s 1989 Term Title VII decisions suggest that the federal law of employment discrimination is currently being transformed into, in the words of Professor Alan Freeman, “just another intentional tort, albeit one with unusually strict intent and causation requirements”). The Supreme Court has increasingly described employment discrimination statutes as providing a species of tort claim. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522 (2013) (stating that the method of analyzing causation provided by the law of torts, not the method provided by the language of Title VII’s section 703(m), should be applied to Title VII retaliation claims under Title VII’s section 704); *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (stating in relation to the analysis of causation for claims brought under the Uniform Services Employment and Reemployment Rights Act of 1994 that “we start from the premise that when Congress creates a federal tort it adopts the background of general tort law”) (emphasis added); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (describing “the statutory employment ‘tort’ created by Title VII”).

showed in class that “[t]he arc of the moral universe is long, but it bends toward justice.” I believed him then, and I believe him now. I just no longer believe that I will see that justice in my lifetime.

And so, I write this message, put it in a bottle, and throw the bottle out to sea in the hope that one day, when the time is right, someone will find the bottle, take out and read the message, and put the words there to some constructive use in reviving Title VII, this good law, and with it the hopes and dreams, the meanings and the practices, the social and legal norms that I believed as an earnest twenty-four-year-old it would come to represent. I’ll first try to describe, as succinctly as possible, what went wrong. Then, a briefer and more conversational conclusion will describe five lessons—some of them quite difficult—that I learned from what happened to Title VII. To admit to ourselves—let alone to others—what we got wrong is hard, but it is important, too. It calls us to hope that what one generation learns can be transmitted to the next, or if not the next, then to the next after that. It challenges us to trust that as a people, we are not doomed to make the same mistakes over and over again.

## I.

### WHAT WENT WRONG?

I don’t mean to say that Title VII and other civil rights laws with which it works have accomplished nothing. In the early 1970s, when I was looking for my first summer job, newspaper “Help Wanted” pages were still separated into “Men Wanted” and “Women Wanted” sections. There had never been an African American President of the United States. Fine. But there are reasons why book shelves and law journals are now populated with pieces about employment discrimination law with titles like “Discrimination Laundering,”<sup>18</sup> “After Civil Rights,”<sup>19</sup> and “When Organizations Rule.”<sup>20</sup> Neither the Rehnquist nor the Roberts Court has been good to civil rights law. If you disagree with this assessment, put the letter back in the bottle and throw it back to sea. But if you are thinking that the struggle somehow went off the rails, and you are wondering what might be learned from it all, read on.

It would take too long and be too depressing to cover all the ways in which the federal courts have bled Title VII. So I’ve chosen just six of a thousand cuts that drained Title VII and the federal statutes and regulations with which it worked of their ability to facilitate structural social change.

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18. GREEN, *supra* note 11.

19. JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2014).

20. Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. OF SOC. 888 (2011).

THE FIRST CUT: *BURDINE* AND THE FETISHIZING OF DISCRIMINATORY INTENT. The Burger Court announced its decision in *Texas Department of Community Affairs v. Burdine*<sup>21</sup> less than three months after Ronald Reagan's inauguration in 1981. It is hard now to imagine that before *Burdine*, the circuits were split on the question of which party should have the burden of persuasion on discriminatory motive in Title VII disparate treatment cases<sup>22</sup> and on exactly where the lines should be drawn between disparate impact and disparate treatment.<sup>23</sup> Not only did *Burdine* solidify the intent requirement

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21. 450 U.S. 248 (1981).

22. Compare *Burdine v. Tex. Dep't of Cmty. Affairs*, 608 F.2d 563, 566 (5th Cir. 1979) (applying the Fifth Circuit's previously stated view that, after plaintiff establishes a prima facie case of disparate treatment discrimination, the burden of persuasion shifts to the defendant to prove by a preponderance of the evidence that its decision was motivated by a legitimate non-discriminatory reason), and *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655, 659 (8th Cir. 1980) (stating that, upon employee's establishment of a prima facie case, the burden shifts to the employer to show by a preponderance of the evidence that "the legitimate reason exists factually"), and *Silberhorn v. Gen. Iron Works Co.*, 584 F.2d 970, 971 (10th Cir. 1978) (stating that, after a Title VII plaintiff establishes a prima facie case of disparate treatment discrimination, "the burden then shifts to the employer to prove by a preponderance of the evidence that the discharge was for legitimate and non-discriminatory reasons"), with *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980) (stating that a disparate treatment defendant does not bear the burden of persuasion on the question of whether its legitimate nondiscriminatory reason was "sound" and contrasting its view with that of the Fifth Circuit), and *Jackson v. U.S. Steel Corp.*, 624 F.2d 436, 442 (3d Cir. 1980) (holding that in a Title VII disparate treatment case, "the burden of persuasion never shifts to the defendant"), and *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980) (holding to the same effect in an Age Discrimination in Employment Act case), and *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-12 (1st Cir. 1979) (stating that the burden that shifts to defendant is merely a burden of production).

23. The essential claim in a disparate treatment case is that a covered entity intentionally treats members—or in an individual case, a member—of a protected group less favorably *because of* their group status. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Proof of discriminatory motivation is critical in a disparate treatment case. See *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988). In Title VII disparate impact cases, on the other hand, the plaintiff need not prove discriminatory motivation to prevail. *Id.* Rather, the plaintiff must demonstrate that the employer uses a particular facially neutral employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). To avoid liability, the defendant must then demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity . . ." *Id.*

Tristin K. Green argues that the now-engrained habit of allowing disparate treatment and disparate impact theories to structure our thinking about discrimination constrains our thinking about what discrimination is and how it operates in ways that reduce the transformative effectiveness of employment discrimination laws. See GREEN, *supra* note 11.

Before the 1980s, systemic discrimination cases, often litigated as class actions, did not so sharply distinguish between "disparate treatment" problems and "disparate impact" problems. Rather, practices that operated as barriers to women's and minority inclusion, such as the non-posting of promotional opportunities, no-transfer policies, and word-of-mouth recruitment, were viewed, along-side statistical evidence of under-representation of women and minority groups in particular jobs, individual stories of biased treatment, or statements evincing bias made by managers, as evidence of systemic discrimination. See, e.g., *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 410-11 (5th Cir. 1974), *rev'd in part on other grounds*, 424 U.S. 747 (1976) (considering together, as evidence of systemic disparate treatment, such diverse practices as word-of-mouth recruitment, non-posting of transfer opportunities, explicit history of racial segregation of departments, no transfer rules, and the expressed unwillingness of white truck drivers to ride with blacks); *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976)

and place its proof squarely on the plaintiff, it also packed into federal disparate treatment theory an occult matrix of defensive *passetti*<sup>24</sup>—escape passages—that began surfacing in the 1990s. They appeared in such guises as the now well-established but utterly nonsensical “honest belief rule,”<sup>25</sup> and a similarly fanciful disparate treatment doctrine known as the “same actor inference.”<sup>26</sup> A third legal principle called the “stray remarks doctrine” has been deployed since the 1990s to magically render egregiously racist, sexist, and ageist statements legally non-probative of discriminatory animus—even when those statements are made by decision makers.<sup>27</sup> As scores of scholars have chronicled, these doctrines, and others both substantive and procedural, have made federal employment discrimination cases all but impossible to prove.<sup>28</sup> Tristin Green refers to the phenomenon as “discrimination

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(considering evidence and applying legal standards now associated exclusively with either disparate impact theory or disparate treatment theory in determining systemic discrimination liability in a Title VII class action brought by African-American employees); *Ingram v. Madison Square Garden Ctr., Inc.*, 482 F. Supp. 414 (S.D.N.Y. 1970) (using evidence of a word-of-mouth recruiting policy, statistical underrepresentation of African Americans in jobs at issue, and subjective hiring practices to find both disparate impact and disparate treatment, leading to an overall finding of systemic discrimination liability). During the 1970s, federal courts would often explain this combined approach by stating at the outset of their analysis, “We begin by repeating the observation . . . that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . and ordained that its policy of outlawing such discrimination should have the ‘highest priority.’” *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 763 (1976) (citations omitted).

24. Italian for “small steps” or “small passages.” The *Passetto di Borgo*, which connects the Vatican with the Castel Sant’Angelo and was used by medieval and renaissance popes as a secret, emergency escape route is an illustrative example.

25. The honest belief rule holds that a plaintiff cannot prevail in an individual disparate treatment case, even if she proves that the “legitimate, non-discriminatory reason” proffered by the defendant was false, so long as the decision maker “honestly believed” that the reason was true; this holds even if the proffered reason was “foolish or trivial or even baseless.” *Jackson v. E.J. Brach Corp.* 176 F.3d 971, 984 (7th Cir. 1999). For more on the honest belief rule, see Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1029–38 (2006).

26. The same actor inference holds that if the same person who participated in making a challenged, negative promotion, termination, or compensation decision about a disparate treatment plaintiff earlier participated in the decision to hire the plaintiff, a “strong inference” of non-discrimination arises because “[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire [or take other actions against them] once they are on the job.” *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991)). For more on the same actor inference and its implausibility in light of psychological science, see Krieger & Fiske, *supra* note 25, at 1039–52.

27. See Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012) (explaining and critiquing the stray remarks doctrine).

28. See, e.g., Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673 (2014) (demonstrating how summary judgment standards are being used in many circuits to unjustifiably dispose of employment discrimination claims before trial); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (surveying the numerous substantive and procedural

laundering,” identifying it as the civil rights enforcement crisis it is.<sup>29</sup> Indeed, if you were in a Title VII study group today, you might justifiably wonder whether Title VII was an employment antidiscrimination law, or an employment discrimination exoneration law.

THE SECOND CUT: KILLING COMPARABLE WORTH. Barely spoken of today, comparable worth<sup>30</sup> theory arose from the radical idea that, to redress the institutionalized patterns of women’s economic subordination that the Equal Pay Act of 1963 had proven unable to eliminate,<sup>31</sup> Title VII should be interpreted to prohibit employers from using “free market” rates to set wage scales because “free” markets necessarily incorporate discriminatory attitudes about the relative value of “male” versus “female” work. Comparable worth theory maintained that employers should be required by Title VII to set salaries for different kinds of jobs according to the skills, knowledge sets, and abilities those jobs required and the working conditions under which they were performed. In this way, work of comparable value

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doctrines that have made even meritorious employment discrimination claims almost impossible to win); Edelman et al., *supra* note 20 (empirically demonstrating changes over time in patterns of judicial inference about the presence or absence of discrimination in relation to the employer’s invocation of symbolic indicia of compliance with civil rights law); Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109 (2012) (cataloging the various doctrinal devices used to defeat employment discrimination claims); Krieger & Fiske, *supra* note 25 (exploring the ways in which disparate treatment doctrines like the honest belief rule, the same actor inference, and the stray remarks doctrine are based on inaccurate models of human social behavior); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006) (describing and critiquing changes in federal employment discrimination law that tilt the playing field sharply in employers’ favor); Elizabeth M. Schneider & Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2013) (exploring developments in federal procedural law that present obstacles to employment discrimination claimants); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (describing how the “stray remarks doctrine” and the federal courts’ crabbed interpretation of the Supreme Court’s decision in *Price Waterhouse v. Hopkins* and *St. Mary’s Honor Ctr. v. Hicks* made Title VII disparate treatment cases extremely difficult to get past summary judgment or judgment as a matter of law).

29. See GREEN, *supra* note 11.

30. The Equal Pay Act of 1963 prohibits a covered employer from paying women and men unequal pay for “equal work.” See 29 U.S.C. § 206(d). The term “equal work” has consistently been interpreted as meaning that the jobs involved must be nearly identical. However, in *County of Washington v. Gunther*, the Supreme Court held that compensation discrimination could be actionable under Title VII even if the work being done by male and female employees was not “equal” within the meaning of the Equal Pay Act. See 452 U.S. 161, 180 (1981). The Court did not, however, define the precise contours of Title VII cognizable claims involving work that was “comparable” in its economic worth to the employer but not “equal” under the Equal Pay Act. *Id.*

31. In 1963, women made 58.9 cents for every dollar made by a man. In 1981, the year that the Supreme Court decided *County of Washington v. Gunther*, 452 U.S. 161 (1981), that ratio was virtually flat at 59.2 cents per dollar. See LINDA LEVINE, CONG. RESEARCH SERV., 98-278E, THE GENDER WAGE GAP AND PAY EQUITY: IS COMPARABLE WORTH THE NEXT STEP? (2004), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1197&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1197&context=key_workplace).



would be compensated *comparably* without building institutionalized patterns of sex discrimination into compensation practices.<sup>32</sup>

Comparable worth theory emerged in the 1960s and 1970s in National Women's Organization campaigns<sup>33</sup> and pink-collar union halls<sup>34</sup> and had its heyday in the late 1970s and early 1980s. In 1977, Eleanor Holmes Norton, then Chair of the Equal Employment Opportunity Commission (EEOC), identified equal pay for work of comparable value as one of the EEOC's main priorities.<sup>35</sup> She commissioned the National Research Council of the National Academy of Sciences to conduct a study of the nature and extent of the gender wage gap and the feasibility of using job evaluation and comparable worth analysis to correct it.<sup>36</sup> The study, published in 1981, concluded that sex segregation of the labor market, the systematic overpayment of male-dominated work in comparison to female-dominated work, and other intentional and unintentional employment practices played a significant role in perpetuating the gender wage gap.<sup>37</sup> The study further concluded that unbiased job evaluations and the scaling of wages to the knowledge sets, skills, and abilities required to do different jobs (i.e., comparable worth analysis) could play a meaningful role in reducing gender-based wage disparities.<sup>38</sup>

In 1983, Holmes Norton declared, "[w]hat affirmative action was in the 1970s, comparable worth is in the 1980s."<sup>39</sup> But it was not to be. Comparable worth theory was dealt its judicial death-blow just two years later, in 1985,

32. See Roslyn L. Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, 10 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 311, 312–13 (1984).

33. See KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE 82–91 (2016) (describing the Chicago NOW Chapter's gender equity campaign against Sears Roebuck that began in 1972, out of which came not only calls to integrate Sears' commissioned sales and management ranks, but also to provide equal pay to women who were performing jobs of comparable value to those performed by men).

34. The American Federation of State, County and Municipal Workers (AFSCME) began advocating for comparable worth policies as early as 1963, as more women began entering public employment, partly resulting from President Kennedy's signing of Executive Order 10988, which, in 1962, gave federal employees the right to collectively bargain. See TURK, *supra*, at 102, 108. In the early 1970s, AFSCME's work was picked up by the Washington Federation of State Employees (WFSE), which led to the Ninth Circuit's disastrous decision in *AFSCME v. Washington*. 770 F.2d 1401 (9th Cir. 1985). For more on the history of the comparable worth movement in Washington, see *Comparable Worth in Washington*, WASHINGTON STATE HISTORICAL SOCIETY, <http://www.washingtonhistory.org/research/whc/oralhistory/comparableworth> (last visited Oct. 19, 2017).

35. Ronnie Steinberg & Lois Haignere, *Separate but Equivalent: Equal Pay for Work of Comparable Worth*, in BEYOND METHODOLOGY: FEMINIST SCHOLARSHIP AS LIVED RESEARCH 154, 156 (Mary Margaret Fonow & Judith A. Cook eds., 1991); TURK, *supra* note 33, at 119–20.

36. NAT'L RES. COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (Donald J. Treiman and Heidi I. Hartmann eds., 1981).

37. *Id.* at 11.

38. *Id.* at 95.

39. TURK, *supra* note 33, at 105.

at the hand of Anthony Kennedy, then a judge on the Ninth Circuit Court of Appeals. In *AFSCME v. Washington*, Judge Kennedy, writing for a three-judge panel, held that failure to pay equal compensation for jobs that a well-executed comparable worth study demonstrated were of comparable value to the employer did not violate Title VII because such practices were justified by free market forces.<sup>40</sup> In terminating the plaintiff's disparate treatment claims, Judge Kennedy opined, "[n]either law nor logic deems the free market system a suspect enterprise."<sup>41</sup> As to the plaintiffs' disparate impact claims, Judge Kennedy simply dismissed without analysis the notion that the use of market forces by employers could ever be challenged as structurally discriminatory.<sup>42</sup> Judge Kennedy's decision in *AFSCME*, in combination with another comparable worth case squelched a year earlier,<sup>43</sup> effectively erased the prospects for pay equity through law, despite the fact that jobs associated with men were consistently valued more than jobs associated with women.

THE THIRD CUT: *EVANS V. JEFF D.* AND THE CULLING OF THE PLAINTIFFS' BAR. The Supreme Court's 1986 decision in *Evans v. Jeff D.*<sup>44</sup> is even more obscure than the Ninth Circuit's decision in *AFSCME v. Washington*, but its deleterious effects on a once vibrant federal equality project may have been even more devastating. In *Jeff D.*, the Idaho Legal Aid Society, a private nonprofit corporation that provided free legal services to low-income individuals and was supported in substantial part by court-awarded attorneys' fees, brought a class action suit for structural injunctive relief against certain Idaho officials, challenging the sufficiency of the educational and health services the State provided to disabled children in the State's care.

After three years of vigorously defended litigation, the defendants offered to settle the case, just one week before trial, for all the relief the plaintiffs had sought—except for one thing. The settlement offer required that the Legal Aid Society forego the attorneys' fees to which they would otherwise be entitled under the Civil Rights Attorney's Fees Awards Act of 1976.<sup>45</sup> Because the suit requested only injunctive relief, an award of attorney's fees was the only way the plaintiffs' counsel could be paid; there was no compensatory damages award from which a contingency payment might have been available.

The settlement arrangement was initially repudiated by the Tenth Circuit on the ground that forcing a plaintiff's lawyer to simultaneously negotiate

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40. 770 F.2d 1401 (9th Cir. 1985).

41. *Id.* at 1407.

42. *Id.* at 1405–06.

43. *See Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984).

44. 475 U.S. 717 (1986).

45. *See* 42 U.S.C. § 1988.

relief for the client and the lawyer's own fees was unethical and against public policy, because it placed plaintiffs' counsel in an untenably conflicted position. But the Supreme Court reversed. It held that such arrangements were perfectly legal and that members of the plaintiffs' bar would simply have to negotiate all relief simultaneously, putting clients' interests before their own, of course.<sup>46</sup> It does not require a degree in economics to realize that *Jeff D.* spelled disaster for the private plaintiffs' civil rights bar, at least that portion of the bar that served poor people or litigated cases seeking structural injunctive remedies rather than large damage awards.<sup>47</sup>

*Jeff D.* snatched back from 42 U.S.C. § 1988 and numerous other civil rights laws the promise of attorneys' fees in civil rights cases seeking institution-transforming injunctions. A few nonprofit law offices, working with organizational plaintiffs, managed a work-around,<sup>48</sup> as did lawyers representing highly paid employees or plaintiffs with lurid sexual harassment cases with high compensatory and punitive damage potential.<sup>49</sup> But it is now clear that *Jeff D.* decimated old-style, plaintiff-side, private civil rights practices in most parts of the United States, particularly those that provided representation to low- and middle-income wage earners.<sup>50</sup> It exploded the

46. See *Evans v. Jeff D.*, 475 U.S. 717, 736–38 (1986).

47. As Alabama District Court Judge Myron H. Thompson wrote in one decision awarding attorney's fees under 42 U.S.C. § 1988:

At issue here is much more than the simple question of how much [plaintiff's] attorneys should receive as attorney fees. At issue is [the] . . . commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court.

*Hide v. Geneva Cty. Bd. of Educ.*, 681 F. Supp. 752, 758–59 (M.D. Ala. 1988).

48. See Daniel Nazer, Note, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 GEO. J. LEGAL ETHICS 499 (2004) (describing how some nonprofit public interest law firms have been able to mitigate the effects of *Jeff D.* through careful client selection and client education). But note that Nazer's data collection involved interviews with only ten lawyers, and he does not indicate whether they were located in large metropolitan areas or in rural settings, where it would be more difficult to locate organizational plaintiffs that might be more amenable to cooperating with an attorney by refusing a no-fee settlement.

49. See, e.g., Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 234–35 (1997) (relating that, after *Jeff D.*, many private lawyers in the author's sample who represented plaintiffs in tort and civil rights cases reported that they would represent civil rights plaintiffs in cases with large damages potential, such as cases involving sexual harassment, but not in equally meritorious cases, such as those involving discriminatory failure to promote, where potential damages were low).

50. See *id.* (concluding from interviews with private plaintiff-side lawyers who handle civil rights cases that they treat civil rights cases the same as "other tort cases" and do not take a case unless it has potential for a substantial damages award from which they can take an adequate contingency fee); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1 (2008) (analyzing the effect of *Jeff D.* on § 1983 cases involving high chances of liability but low damages potential or injunctive relief only); Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1989) (surveying the numerous ways in which

business model of scores of private lawyers who brought run-of-the-mill employment discrimination cases for low- and middle-income people, or who specialized in civil rights cases seeking primarily or exclusively injunctive relief, and it contributed to a sharp contraction of the plaintiff-side federal civil rights bar.<sup>51</sup> No lawyers, no cases. No cases, no enforcement. Most particularly, no enforcement through structural injunctions.

THE FOURTH CUT: DISPARATE IMPACT THEORY. The erosion of disparate impact theory, which began almost immediately after the theory's emergence in *Griggs v. Duke Power Company*<sup>52</sup> in 1971, was particularly devastating to movement lawyers because disparate impact theory held such promise as a tool to dismantle structural forms of racism and sexism.<sup>53</sup> Unlike disparate treatment theory, which could be used only to challenge the negative treatment of minorities and women under facially neutral practices assumed to be unproblematic from a gender or racial justice standpoint, disparate impact theory provided a tool for challenging facially neutral structures of subordination. Unlike disparate treatment theory, disparate impact theory provided a basis for claiming that a seemingly neutral metric for measuring merit was *itself* discriminatory in a way that violated Title VII.

The early disparate impact cases like *Griggs*, a race discrimination case, or *Dothard v. Rawlinson*,<sup>54</sup> a sex discrimination case, required only that, to establish a *prima facie* case of discrimination, a plaintiff show that some facially neutral standard or procedure used by an employer selected applicants for hire or promotion in a significantly discriminatory pattern. Proof of intent to discriminate was not required. In other words, to prove a disparate impact case was to reveal the levers of racial and gender subordination embedded in seemingly neutral institutionalized practices.

Early in the theory's short life, plaintiffs were able<sup>1</sup> to use relatively accessible demographic statistics maintained by federal agencies like the U.S. Bureau of the Census<sup>55</sup> or judicial or administrative findings in cases from different parts of the country to make an initial showing of disparate

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Supreme Court decisions, including *Evans v. Jeff D.*, have undermined the statutory right to attorney's fees for prevailing civil rights plaintiffs, leading to a sharp decline in the availability of lawyers willing to represent them).

51. Reingold, *supra* note 50, at 28–31.

52. 401 U.S. 424 (1971).

53. See, e.g., George I. Lovell, Michael McCann & Kirstine Taylor, *Covering Legal Mobilization: A Bottom-Up Analysis of Wards Cove v. Atonio*, 41 LAW & SOC. INQUIRY 61, 74–78 (2016) (describing the fit between early formulations of disparate impact theory and theories of institutionalized racism and sexism and the way in which disparate impact theory was used as a tool for organizing workers and raising political and legal consciousness in the Filipino community in the Pacific Northwest during the 1970s).

54. 433 U.S. 321 (1977).

55. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 n.6 (using Census Bureau adult population statistics to determine comparative high school graduation statistics for blacks and whites).

impact.<sup>56</sup> The statistical significance of that impact could be established through relatively straightforward statistical analysis, often based on nationwide impact statistics providing a large sample size.

Moreover, in the early years of Title VII enforcement, most courts did not require plaintiffs to prove a direct causal link between the challenged practice and disparate impact on the specific members of the plaintiff class in their particular case.<sup>57</sup> If general statistics showed the criterion or practice to have a disparate impact, courts were generally willing to infer that it would have a disparate impact on the plaintiff population.<sup>58</sup>

Once the plaintiff or complainant made out a *prima facie* case of disparate impact, the burden of *proof* (not merely a burden of coming forward with evidence) shifted to the defendant to show that the challenged practice was justified by business necessity. Particularly in cases involving scored tests or other objective criteria, like an experience or educational requirement, showing the required level of job-relatedness was often difficult. Courts routinely used the testing validation requirements of the Uniform Guidelines on Employee Selection Procedures,<sup>59</sup> which applied rigorous professional standards to the validation of scored tests and other purported predictors of job performance, to assess job-relatedness.

The results were initially impressive. During the 1970s and early 1980s, civil rights lawyers used disparate impact theory to attack a wide array of selection requirements and processes that perpetuated patterns of gender and racial hierarchy in the labor market. These practices included education<sup>60</sup> and experience<sup>61</sup> requirements, the use of prior salary to set salaries at the entry level, arrest<sup>62</sup> and conviction records,<sup>63</sup> garnishment exclusions,<sup>64</sup> failures to

56. *Id.* (using prior EEOC decisions to determine black and white pass rates on the Wonderlic and Bennett tests, which defendant used to select employees for inside department jobs).

57. Lovell et al., *supra* note 53, at 77.

58. *E.g., Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (using nationwide statistics to show that a height and weight requirement for prison guards would disproportionately eliminate women from employment and dismissing the argument that small women would be less apt to want employment as a prison guard so disparate impact should be assessed only on the group of women who actually applied for the position).

59. 29 C.F.R. § 1607.1–.13 (1978).

60. *E.g., Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976).

61. *E.g., EEOC v. Int'l Union of Operating Eng'rs Local 14*, 553 F.2d 251 (2d Cir. 1977) (invalidating a 200-day minimum experience requirement under disparate impact analysis).

62. *E.g., Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd and vacated in part on other grounds*, 472 F.2d 631 (9th Cir. 1972) (invalidating employer use of arrest record under disparate impact theory).

63. *E.g., Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (invalidating employer's use of an absolute exclusion of anyone with a criminal conviction other than a minor traffic offense from consideration for employment).

64. *E.g., Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490 (C.D. Cal. 1971) (invalidating under disparate impact theory an employer's policy of terminating employees who had their wages garnished).

post promotional opportunities,<sup>65</sup> word-of-mouth recruitment practices,<sup>66</sup> and overly subjective decision-making systems,<sup>67</sup> to name a few.

Most people who know just a little bit about Title VII, as it compares to, say, the Equal Protection Clause of the Fourteenth Amendment, will tell you, even today, that among civil rights laws, Title VII's distinguishing feature is the availability of disparate impact theory. Title VII, they will say, is a particularly powerful civil rights tool because one needn't prove intent to discriminate to make a case. What this statement elides is that disparate impact theory, even under Title VII, has been so severely limited by judicial decisions and legislative compromises that it is of little practical utility today in the struggles for racial or gender equality.

The almost instantaneous judicial response to *Griggs* was a fence around it. After *Griggs*, the Supreme Court acted quickly and consistently to limit disparate impact theory's spread into other statutory and constitutional territory. In *Washington v. Davis*,<sup>68</sup> the Court held in 1976 that disparate impact claims were not actionable under the Equal Protection Clause of the Fifth Amendment. Three years later, in *Massachusetts Administrator v. Feeney*,<sup>69</sup> the Court extended *Davis*, holding that to successfully challenge a facially neutral practice or policy under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must prove that the practice or policy was adopted *because of*, not merely *in spite of*, its negative effect on a protected group. That negated the possibility of pressing disparate impact claims in cases under 42 U.S.C. § 1983. In subsequent cases, the Court held that disparate impact claims were unavailable in cases arising under 42 U.S.C. § 1981,<sup>70</sup> Title VI of the Civil Rights Act of 1964,<sup>71</sup> and the Age Discrimination in Employment Act.<sup>72</sup> It probably would have done the same with the Americans with Disabilities Act had the ADA's drafters not seen enough to

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65. *E.g.*, *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 358–59 (5th Cir. 1972) (discussing how the failure to notify hourly employees of promotion opportunities had an unlawful disparate impact on African American hourly employees and was not justified by business necessity).

66. *E.g.*, *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 418–19 (5th Cir. 1974) (finding that the company's reliance on word-of-mouth advertising by an all-white office staff contributed to racially discriminatory hiring practices).

67. *E.g.*, *Rowe v. Gen. Motors Corp.*, 457 F.2d at 348, 353, 358–59 (5th Cir. 1972) (finding discriminatory, in a disparate impact race discrimination case, a promotion system that required a positive subjective evaluation by the foreman of a candidate's "ability, merit, and capacity" before further considering the promotion).

68. 426 U.S. 229, 238 (1976).

69. 442 U.S. 256, 258 (1979).

70. *See* *Gen. Bldg. Contractors A'ssn v. Pennsylvania*, 458 U.S. 375 (1982).

71. *See* *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 597 (1983); *accord* *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

72. *See* *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) (recognizing that the "reasonable factor other than age" provisions of the ADEA preclude the use of standard disparate impact theory in age discrimination cases).

know that they needed to include disparate impact provisions in the statute's plain language.<sup>73</sup>

Even under Title VII, where disparate impact cases are theoretically cognizable, the Burger and Rehnquist Courts so narrowly drew the contours of the claim that disparate impact cases became almost impossible to win and, for that reason, became increasingly rare. The narrowing began almost immediately after *Griggs* was decided in 1971, but it wasn't until the late 1980s that the full extent of the damage became obvious.

In reversing the district court and ruling in Percy Green's favor in *Green v. McDonnell Douglas Corporation*, the Eighth Circuit relied in significant measure on the Supreme Court's decision in *Griggs*. The argument was simple, elegant, and profoundly threatening to structures of racial subordination. Because Blacks like Percy Green, a long-time St. Louis Movement leader, were more likely than Whites to have participated in civil disobedience actions, a hiring policy that screened him out on that basis would *prima facie* violate *Griggs*. Having participated in unlawful civil rights activities did not necessarily indicate that Mr. Green was unable to perform the job he sought to refill at McDonnell Douglas, the court observed, and "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>74</sup>

The Supreme Court's unease with this argument from *Griggs* is readily apparent in its own *McDonnell Douglas* opinion.<sup>75</sup> Indeed, the Supreme Court's "project" in *McDonnell Douglas* can meaningfully be understood, at least in significant measure, as an effort to cabin disparate impact theory to a narrow band of disputes, to separate disparate impact theory from disparate treatment theory, and to create in disparate treatment theory an entirely different proof framework, with its own essential elements that focus the analysis narrowly on discriminatory intent instead of on the broader social conditions from which the dispute emerged.<sup>76</sup>

The Supreme Court moved again to cabin disparate impact theory in 1977, this time in the context of Title VII systemic discrimination cases. The Court's opinion in *Teamsters v. United States*<sup>77</sup> reflects an urgent judicial preoccupation with distinguishing systemic disparate treatment cases, which the Court made clear would require proof of intent to discriminate, from what the Court suggested would be the more limited class of cases premised on the

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73. 42 U.S.C. § 12112(b)(6) (2012).

74. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 343 (8th Cir. 1972).

75. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805–06.

76. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) (chronicling the federal judicial effort since the 1970s to splice Title VII analysis into separate analytical rubrics, such as disparate impact and disparate treatment, and arguing that preoccupation with these rubrics obscures the field's more important issues and restricts relief).

77. 431 U.S. 324 (1977).

disparate impact theory announced in *Griggs*, which would not.<sup>78</sup> After *Teamsters*, one finds fewer federal systemic discrimination cases combining structural and attitudinal barriers in the same analysis. Instead, attitudinal barriers were sheared off and analyzed under disparate treatment theory, while structural barriers were increasingly analyzed under a more stringently drawn disparate impact rubric.

This new stringency appeared full force two years after the *Teamsters* decision, in *New York Transit Authority v. Beazer*,<sup>79</sup> in which the Burger Court sharply limited disparate impact plaintiffs' ability to establish a *prima facie* case. In *Beazer*, the Court announced that to establish a *prima facie* case of disparate impact, a plaintiff would have to show that the alleged disparate impact affected members of the plaintiff's protected class who were *otherwise qualified* and available for the specific positions at issue in the case.<sup>80</sup>

Prior to *Beazer*, the Court had in such circumstances allowed disparate impact plaintiffs to use general population statistics, such as national median height and weight statistics for males and females, to prove the impact element of a *prima facie* disparate impact case. So, for example, in *Dothard v. Rawlinson*,<sup>81</sup> the Supreme Court allowed a class of female disparate impact plaintiffs seeking Alabama prison guard positions to use nationwide height and weight statistics to show that minimum height and weight requirements would fall more heavily on women than men. The Court permitted this over defendants' objection that plaintiffs should be required to show that the disparate impact affected actual applicants for the positions at issue. Rejecting this argument, the *Dothard* Court had followed its earlier decision in *Griggs*. There, the Court had allowed the plaintiffs to use state-wide population statistics from the 1960 census to prove that a high school degree requirement would fall more heavily on blacks than whites, and had further allowed the plaintiffs to use evidence from a 1966 EEOC decision to prove

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78. *Id.* at 335 n.15 (clarifying that the United States would have to prove discriminatory intent to prevail in *Teamsters* by opining: "'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. (citation omitted) Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. (citation omitted) Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (citation omitted) Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.") Compare, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432 (1971), with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806 (1973).

79. 440 U.S. 568 (1979).

80. *Id.* at 585-86.

81. 433 U.S. 321, 330-31 (1977).



that the tests Duke Power Company was using would have a disparate impact on its African American employees and applicants.<sup>82</sup>

On reading the majority opinion in *Beazer*, anyone familiar with methods of statistical proof in disparate impact cases would immediately realize, as Justice Brennan's dissent pointed out,<sup>83</sup> that *Beazer's* new standard for proving the impact element would in most cases be impossible for a plaintiff to satisfy. That is because, taking the facts in *Beazer* as an example, while one might be able to find in publicly available records or to otherwise determine the relative proportions of, say, Blacks and Latinos versus Whites in public methadone maintenance programs in the City of New York, no one would be able to find in government records, or even develop oneself, an analysis comparing the relative proportions of Blacks and Latinos and Whites who: (1) were qualified to operate New York City buses or subway trains *and* (2) were receiving public *or* private methadone maintenance treatment.<sup>84</sup> But this is precisely what the Supreme Court demanded of the plaintiffs in *Beazer*, and the demand doomed their case—and many cases after it—to fail at the *prima facie* stage.

Though many people identify the demise of disparate impact theory with its near drowning death in 1989 in *Wards Cove*,<sup>85</sup> much damage had already been done by the time Reagan was inaugurated in 1981 and began his Administration's assault on structural models of equality. In 1973, approximately sixty-three percent of equal employment opportunity (EEO) cases filed in the federal district courts had stated a claim under disparate impact theory. By 1981, that proportion had already dropped to approximately twenty percent.<sup>86</sup> But the worst was yet to come.

Disparate impact theory's utility in redressing structural forms of discrimination deteriorated further in the 1980s and the 1990s, even after passage of the Civil Rights Act of 1991, which was supposed to resuscitate disparate impact theory. While the Civil Rights Act of 1991 changed certain aspects of the Supreme Court's decision in *Wards Cove*, other if its pernicious aspects either made their way into the 1991 amendments<sup>87</sup> or were left undisturbed by them.

82. 401 U.S. 424, 430 n.6 (1971).

83. *New York City Transit Auth. v. Beazer*, 440 U.S. 586, 597–602 (1979) (Brennan, J., dissenting).

84. This was the plaintiffs' impossible situation in *Beazer*. *Id.*

85. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

86. LAUREN B. EDELMAN, *WORKING LAW*, *supra* note 11, at 59.

87. Specifically, the *Wards Cove* majority held that to state a *prima facie* case of disparate impact discrimination, a plaintiff would have to identify a *particular* employment practice and then demonstrate that it had *caused* the demonstrated disparate impact. *Wards Cove Packing Co.*, 490 U.S. at 656–67. These “particularity” and “causation” requirements insinuated their way into the 1991 Amendments, appearing in part in section 703(k)(1)(A), which provides now in pertinent part:

Specifically, under the 1991 disparate impact amendments to Title VII and the few cases that have applied it, a plaintiff must identify a particular<sup>88</sup> employment practice that the Court deems suitable for disparate impact analysis,<sup>89</sup> then show that this particular employment practice caused a significant<sup>90</sup> negative impact on members of the protected class who were otherwise qualified to perform the jobs at issue.<sup>91</sup> These newly codified essential elements have made it extremely difficult to move potential disparate impact cases past the *prima facie* case stage.

By 1999, only about four percent of EEO merits adjudications in federal court involved disparate impact claims.<sup>92</sup> But that four percent only hints at a much more dismal story. By that same year, only ten percent of that four percent (0.4%), or approximately two fifths of one percent of all federal EEO

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(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a *particular* employment practice that *causes* a disparate impact on the basis of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(k)(1)(A).

The “particularity” and “causation” requirements, together with the *Beazer/Wards Cove* requirement, not disavowed by the 1991 Amendments, that the impact analysis be conducted on individuals who are otherwise qualified for and interested in the contested positions, make the *prima facie* disparate impact showing deceptively difficult to establish. For one scholarly take on this problem, see Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325 (1996) (describing how the use of two or more selection practices, which the authors call “concurrence,” or “stratification,” the use of a single criterion in a heterogeneous population, can unworkably complicate proof of the new causation element).

88. This element can be harder to satisfy than one might think, because many selection procedures involve a multi-component process where data clearly separating the results of each component’s application are not maintained by the employer. In such cases, the plaintiff’s case will fail at the *prima facie* case stage unless the court finds, which it rarely does, that the components of the employer’s process are “incapable of separation for analysis” within the meaning of 42 U.S.C. § 2000e-2(k)(1)(B)(i). *See, e.g., Stout v. Potter*, 276 F.3d 1118, 1124 (2002) (finding that female postal inspectors failed adequately to identify a “specific” employment practice within a multi-component selection process that disproportionately excluded them because of their gender).

89. *See Wal-Mart v. Dukes*, 564 U.S. 338, 357 (2011) (holding that a subjective decision-making system was not a “specific employment practice” amenable to disparate impact analysis). Federal courts have found other “particular practices” per se unsuitable to disparate impact analysis. *See e.g., AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (finding use of “market rates” to set pay for stereotypically “male” versus “female” jobs); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 305 (holding that word-of-mouth recruitment was not a “specific employment practice” amenable to disparate impact analysis).

90. To meet this standard, the disparity is ordinarily required to be statistically significant at the .05 level. *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003)

91. *Stout*, 276 F.3d at 1123 (9th Cir. 2002) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989)) (holding that disparate impact analysis should generally be based on the applicant pool or relevant labor market from which the positions at issue are filled).

92. LAUREN B. EDELMAN, *WORKING LAW*, *supra* note 11, at 58 (using the data set compiled for and first described in Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. OF SOC. 888 (2011)).

merits adjudications, involved disparate impact claims that made it through the plaintiff's *prima facie* case stage and reached the question of business justification.<sup>93</sup> Let me say that once more, clearly—by 1999, only about two fifths of one percent of EEO merits adjudications in the federal courts involved a question concerning the business justification of a practice that had survived the *prima facie* case stage of the disparate impact analysis and was being scrutinized under something vaguely resembling a business necessity standard. For all intents and purposes, Title VII cases premised on disparate impact theory have disappeared from federal dockets. The theory is all but dead.

THE FIFTH CUT: THE DEMISE OF AFFIRMATIVE ACTION. In 2006, Alexandra Kalev and her colleagues published a pair of articles<sup>94</sup> reporting the results of their large empirical study examining the effects of various EEO, affirmative action, and diversity programs undertaken by a random sample of EEO-1 reporting employers on the percentages of women and African Americans subsequently represented in management positions at those companies. What they found surprised a lot of people: the independent variable most strongly associated with increased management diversity was a company having been subjected to a Department of Labor Office of Federal Contract Compliance Programs (OFCCP) compliance review during the 1970s, before Ronald Reagan became President in 1981.<sup>95</sup> Diversity training wasn't associated with increases in management diversity. Having been sued<sup>96</sup> wasn't associated with increases in management diversity. Including a "diversity performance" criterion on managers' performance appraisals wasn't associated with increases in management diversity.

What was it about OFCCP compliance reviews conducted in the 1970s that might have had this particularly salutary effect on management diversity? Affirmative action.

President Johnson's Executive Order 11246, which was amended to include sex by Executive Order 11375 and strengthened by regulations

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93. Statistical analysis of data first reported in Lauren B. Edelman et al., *When Organizations Rule*, *supra* note 93, (STATA reports generated by Rachel Best, November 14, 2014, on file with author).

94. Alexandra Kalev and Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855 (2006) [hereinafter *Enforcement*]; Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006) [hereinafter *Best Practices*].

95. Kalev et al., *Best Practices*, *supra* note 94, at 603; Kalev & Dobbin, *Enforcement*, *supra* note 94, at 883.

96. Kalev and her associates did not differentiate suits by individuals for harassment or disparate treatment from systemic discrimination suits filed by the government or as class actions. There is reason to believe that systemic discrimination suits would have functioned more like OFCCP compliance reviews, and thus behaved statistically more like OFCCP compliance reviews than like individual lawsuits. See *supra* text accompanying notes 78–79.

promulgated in 1969 by President Richard Nixon,<sup>97</sup> required every federal contractor employing over 50 employees or having more than \$50,000 per year in federal contracts to write an affirmative action plan calculated to increase the participation of women and minorities in their workforce. Under these plans, contractors were required to conduct annual utilization analyses to determine whether they were employing women and members of minority groups in numbers proportional to their representation in the qualified, available labor market. When contractors identified areas of underutilization, they were required to do two things. First, they had to engage in critical self-analysis to identify and remove organizational barriers to full inclusion of members of groups found to be underutilized. Second, they had to develop goals and timetables for reaching parity between availability and utilization.<sup>98</sup> In other words, they had to develop and implement affirmative action programs. As part of these plans, contractors were required to establish clear organizational lines of authority for implementing affirmative action obligations and to report annually to the Department of Labor on their progress in meeting affirmative action goals. Employees vested with responsibility for implementing these plans had to be supplied with the authority, resources, and access to top management officials that would ensure effective implementation.<sup>99</sup> Progress under the plans was monitored by the OFCCP, and companies found to be out of compliance could be and frequently were sanctioned.

Over the course of the 1970s, enforcement of the Executive Orders became increasingly aggressive, and more closely coordinated with the activities of the EEOC, which was responsible for identifying, investigating, and if all else failed, bringing pattern and practice lawsuits against employers whose utilization statistics or records of individual complaints indicated patterns and practices of organizational race, sex, or national origin discrimination.<sup>100</sup> In the 1970s, large employers that were not subject to the Executive Orders were also likely to implement affirmative action plans<sup>101</sup> that included utilization analysis, barrier identification, and goals and timetables for female and minority inclusion. These measures served as

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97. 41 C.F.R. § 60 (1969). See generally Ruth G. Shaeffer, *NONDISCRIMINATION IN EMPLOYMENT: CHANGING PERSPECTIVES, 1963-1972* (1973) (describing the 1969 OFCCP regulations and the change they effected in enforcement of the Executive Orders).

98. 41 C.F.R. §§ 60-2.11-2.30 (1969). The directive requiring contractors to adopt affirmative action goals and timetables for remedying areas of under-utilization upheld in numerous cases. *E.g.*, *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *S. Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *United States v. Duquesne Light Co.*, 423 F. Supp. 507, 510 (W.D. Pa. 1976).

99. See Krieger, *The Watched Variable Improves*, *supra* note 15, at 302-305 (thorough description of affirmative action programs).

100. *Id.* at 304.

101. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding affirmative action plans permissible under Title VII based on a plan that gave rise to the reverse discrimination lawsuit).

protection against pattern and practice lawsuits, which could be filed not only by the EEOC, but also by private individuals or organizations representing a class under a once-vigorous Rule 23 of the Federal Rules of Civil Procedure.

When the government or a privately named plaintiff succeeded in proving a pattern and practice of discrimination, or in suggesting in pretrial proceedings or negotiations that they would be able to do so, a defendant employer would frequently enter into a consent decree to settle the dispute.<sup>102</sup> These consent decrees regularly contained structural injunctive components that mirrored those imposed under the Executive Orders, including requirements for utilization analysis, the identification and removal of barriers to inclusion, the setting of goals and timetables for reaching parity between availability and utilization of members of underrepresented groups, reporting to plaintiffs' counsel and to the court or a special master, and other affirmative action obligations.

Kalev, Dobbin, and Kelly's work demonstrated that these structural interventions, which established clear organizational lines of accountability to external authority and required changes to organizational practices, were associated with significant, measurable effects on the gender and racial integration of management ranks decades later.<sup>103</sup> Earlier research provides additional evidence that private pattern and practice lawsuits, or the threat of such lawsuits, also played a significant role in integrating workplaces through the establishment of affirmative action programs and related organizational accountability practices.<sup>104</sup> Systemic approaches to identifying and reducing gender, ethnic, and racial discrimination in employment can be, and have been, effective in reducing economic stratification and segregation in American labor markets. We know how to do this; we've done this before.

Unfortunately, the advent of the Reagan Administration marked the beginning of the end for these effective initiatives. In 1979, William Bradford Reynolds, the head of the Reagan Justice Department's Civil Rights Division, not only stopped requesting goals and timetables in employment discrimination lawsuits, he took the position in cases across the country that

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102. A consent decree is a type of settlement entered into voluntarily by the parties to litigation involving requests for structural injunctive relief. The consent decree is approved by the assigned judge and is treated as a judicial decree, enforceable under the court's contempt power. *See, e.g.,* *Firefighters Local 93 v. City of Cleveland*, 487 U.S. 501 (1986) (describing and upholding the legality of goals and timetables commitments entered into in a consent decree with private discrimination plaintiffs in a Rule 23 class action).

103. Kalev et al., *Best Practices*, *supra* note 94, at 602–03; Kalev & Dobbin, *Enforcement*, *supra* note 94, at 889.

104. *See, e.g.,* Jonathan S. Leonard, *Women and Affirmative Action*, 3 J. ECON. PERSP. 61 (1989) (describing the role played by pattern and practice lawsuits, and the threat of pattern and practice lawsuits, on the gender integration of American labor markets); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978) (describing the critical role played by private class actions in the enforcement of Title VII during the 1970s).

such remedies were unconstitutional.<sup>105</sup> At the EEOC, Chairman Clarence Thomas shrank the EEOC's Systemic Unit, announced that the Commission would no longer seek goals and timetables relief in ongoing systemic discrimination cases, questioned the use of statistics in proving even systemic discrimination, and focused the Commission's enforcement efforts on individual disparate treatment cases.<sup>106</sup>

The deregulatory policies of the Reagan Administration, combined with its hostility to affirmative action, devastated the OFCCP's contract compliance program. Employers were given increasing latitude over compliance activities, and compliance reviews were less intrusive and more rapidly concluded. The number of conciliation agreements and back pay awards declined, and the OFCCP no longer required the setting of goals and timetables to remedy underutilization.<sup>107</sup> By the 1990s, EEO/affirmative action departments at major corporations were being replaced with Human Resources Departments, and the language of "civil rights" and "affirmative action" was giving way to the language of "diversity."<sup>108</sup>

Rule 23 class actions also came under assault. Through the late 1960s and most of the 1970s, federal courts in most circuits followed a liberal policy of interpreting the requirements of Rule 23 and readily certified what were then known as "across-the-board" class actions.<sup>109</sup> This approach stemmed largely from the Fifth Circuit's influential opinion in *Johnson v. Georgia Highway Express, Inc.*, which had permitted a discharged African American employee to serve as named plaintiff for a class of African American current employees, discharged employees, and unsuccessful applicants.<sup>110</sup> Acknowledging that the case would present different factual questions regarding these different subgroups of employees, the *Johnson* Court nonetheless certified the class, stating that the "Damoclean threat of a racially

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105. *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (the first of Reynold's employment discrimination lawsuits, a private class action against the New Orleans Police Department, in which the Justice Department filed an amicus curiae brief arguing that goals and timetables violated the Equal Protection Clause of the Fifth Amendment). See also Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003 (1989) (describing the Reagan attack on affirmative action in depth).

106. David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1158 (1989). Although goals and timetables remedies were not officially removed from Executive Order regulations until much later, or from the EEOC Compliance Manual, their actual enforcement came to a screeching halt during the Reagan years. See generally Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation - Survival Against the Odds*, 62 TUL. L. REV. 681, 702-07 (1988).

107. Kelly & Dobbin, *Enforcement*, *supra* note 94, at 862-65.

108. LAUREN B. EDELMAN, *WORKING LAW*, *supra* note 11, at 138-140.

109. See *Piva v. Xerox Corp.* 70 F.R.D. 378, 385-87 (N.D. Cal. 1975) (discussing the majority orientation towards liberal class certification analysis).

110. 417 F.2d 1122 (5th Cir. 1969).

discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.”<sup>111</sup>

But beginning in the late 1970s, the Rule 23 tide began to turn when the Burger Court began tightening standards for the certification of private employment discrimination class actions under Rule 23. In 1977, in *East Texas Motor Freight System, Inc. v. Rodriguez*,<sup>112</sup> the Supreme Court turned against the view championed by the Fifth Circuit in *Johnson* that the requirements of Rule 23(a) should be read liberally in discrimination cases and conducted a markedly more rigorous application of the Rule 23(a) prerequisites than was customary in Title VII suits. This gesture toward a more rigorous approach to the certification of employment discrimination class actions became a full turn in 1982 in *General Telephone Co. of Southwest v. Falcon*.<sup>113</sup> There, the Supreme Court explicitly rejected the “across-the-board” class action, and, in the words of Chief Justice Burger, made clear that “strict attention to the requirements of Rule 23 is indispensable in employment discrimination cases.”<sup>114</sup>

I know this is the place where a reader might reasonably expect an expression of despair over *Wal-Mart Stores, Inc. v. Dukes*.<sup>115</sup> Make no mistake, I think the *Wal-Mart* case was a train wreck, not only with respect to class certification standards, but also in how the majority characterized what discrimination is, why and how it occurs, and how courts can recognize and remedy it when it does occur. But if we think, as I suggest we should, about employment discrimination law not as a species of tort law, but as liberatory praxis, by 2011, the damage to Title VII class actions, and more importantly, to the use of class actions to bring about structural changes conducive to the racial, ethnic, and gender integration of American labor markets, had long been done.

THE SIXTH CUT: MANDATORY ARBITRATION. Even if the five previously described calamities had never descended, the rise of pre-dispute mandatory arbitration agreements culminating in *Epic Systems* would have undermined Title VII’s effectiveness as a tool for meaningful social change. There was ample reason to despair of Title VII’s efficacy as a channel of liberatory praxis before the Spring of 2018, but after the Supreme Court’s May 2018 decision in *Epic Systems v. Lewis*,<sup>116</sup> it is hard to imagine what, short of Bernie Sanders’ revolution, could turn things around. In *Epic Systems*, newly-confirmed Justice Neil Gorsuch held for an all-too-familiar

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111. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (1969) (quoting *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966)).

112. 431 U.S. 395 (1977).

113. 457 U.S. 147 (1977).

114. *Id.* at 161–62 (Burger, C.J., concurring in part and dissenting in part).

115. 564 U.S. 338 (2011).

116. \_\_\_ U.S. \_\_\_, 138 S. Ct. 1612 (2018).

five justice majority that, the concerted activities provisions of the National Labor Relations Act notwithstanding,<sup>117</sup> under the Federal Arbitration Act,<sup>118</sup> an employer can require its employees, as a condition of getting or keeping their job, to forgo their right to engage in collective activity in the form of class action litigation – or even class action arbitration. Under Epic Systems, any employer can force all employment discrimination disputes into secret, individualized arbitration proceedings, no matter how important the public issues at stake or how ineffective individualized adjudication might be in addressing them. If you view antidiscrimination law as a national public law project and not as a species of private tort, Epic Systems dwarfs Wal-Mart's importance in disabling Title VII as an engine of social change.

Civil rights law is quintessential public law. Private law occupies itself with harms to individual people and organizations, while public law concerns harms to the polity as a whole.<sup>119</sup> Private law concerns systems of private ordering, like the making of contracts or wills, while public law concerns the ways in which we constitute ourselves and our institutions. In private law litigation, remedies are for the most part backward-looking rather than forward-looking. Private law litigation's impact is, by and large, confined to the immediate parties to a dispute. Public law litigation, on the other hand, aims above all else to structure and reform institutionalized practices.<sup>120</sup> It therefore frequently seeks structural injunctive remedies that can literally change the lives of those beyond the immediate parties. Public law, in other words, is a *public* resource,<sup>121</sup> and when public law litigation, which can reform the substantive law<sup>122</sup> and transform public norms and values, disappears into secret private spaces, we lose an important channel for social change.

The proliferation of public law statutes in the Progressive Era, the New Deal, and Civil Rights Movement had profound effects on federal civil

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117. 29 U.S.C. § 158(a)(1) protects employees' rights to engage in concerted activities in pursuit of their "mutual aid or protection" within the meaning of 29 U.S.C. § 157.

118. 9 U.S.C. § 2.

119. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1986) (coining the term "public law litigation" and contrasting its characteristics with those of private law litigation).

120. Cf. *id.* at 1284, 1295, 1302 (stating that in public law litigation, "[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy").

121. For the master work on this point, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1993).

122. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) provides a thorough and chilling argument supporting the proposition that the three decades long expansion of unbargained-for, non-consensual, pre-dispute arbitration procedures validated by the Supreme Court in cases from *Gilmer v. Interstate Johnson-Lane*, 500 U.S. 20 (1991) to *American Express Co. v. Italian Colors Restaurant*, 33 S. Ct. 2304 (2013), undermines not only the effective mobilization of public law, but substantive public law itself.



procedure, and related remedial statutes. This proliferation<sup>123</sup> led, for example, to the promulgation of new rules expanding joinder, intervention, and class actions; the development of private attorney general theory as a basis for awarding attorneys' fees in public law litigation;<sup>124</sup> and the use of structural injunctions, consent decrees, and oversight by special masters in complex public law litigation.<sup>125</sup> The drafters of the 1966 Amendments to the Federal Rules of Civil Procedure must have known that the rules they were writing would make it easier for public law cases to be filed and decided on the merits. The Congresses that enacted 42 U.S.C. § 1988, and the plethora of other public law statutes that provided attorney's fees provisions for prevailing plaintiffs, would have known that they were crafting public judicial institutions designed to facilitate use of the courts by public law plaintiffs.

Anyone who has studied the *Erie* doctrine will incline toward taking for granted the distinction between substance and procedure. Anyone who has *only* studied law, and not any of the law-engaged social sciences, will incline toward making too much of that distinction, because they will overlook issues relating to rights mobilization.<sup>126</sup> Procedural rules, particularly those permitting cases to proceed as class actions, setting pleading or summary adjudication standards, or defining the scope of discovery, profoundly affect ordinary people's ability to successfully mobilize public law. Patterns of compensation for prevailing plaintiffs' attorneys will have the same effect, as earlier discussed.

Whether adjudication takes place in *public* is also important to rights mobilization. Public adjudication to judgment, or even at times adjudication to interlocutory rulings, like the granting of a preliminary injunction or the failure of a defendant's motion to dismiss a high-profile case, often find their way into media accounts of important social issues. Through these accounts, civil litigation shapes people's legal consciousness, which in turn affects people's willingness to mobilize legal rights.<sup>127</sup> Mandatory, pre-dispute

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123. Chayes, *supra* note 119, at 1282 (describing the expansion of litigation over public rights in the post-New Deal United States).

124. 42 U.S.C. § 1988.

125. See, e.g., Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 216 (2000) (discussing the relationship between the 1966 amendments to the Federal Rules of Civil Procedure and the growth of public law litigation).

126. See Catherine T. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11 (2005) (introducing the role of rights mobilization in public law enforcement).

127. See DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003) (discussing the relationship between civil rights laws and the development and impact of legal consciousness on rights mobilization). See also William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1981); Laura B. Nielsen, *Situating Legal*

agreements to confidentially arbitrate employment discrimination claims have effectuated the mass federal rendition of what was once a vibrant and norm-changing field of public law into to a vast black site of secret, private, quasi-adjudication.<sup>128</sup> We don't really know what percentage of the American workforce is now covered by nonconsensual pre-dispute mandatory arbitration agreements.<sup>129</sup> We really do not even know what federal, or for that matter state, anti-discrimination "law" is anymore, because none of the thousands—maybe tens of thousands—of forced, secret employment discrimination arbitrations are published. As Myriam Gilles has described, it is as if doctrinal development has ceased for entire categories of cases swept into this twilit netherworld. Just as she said, forced, secret arbitration represents—quite literally—the end of law.<sup>130</sup>

## II.

### LESSONS LEARNED

If you still are reading this, and you were born recently enough that you do not personally remember a time when Ronald Reagan was President, then my bottle plan worked. If you care about gender, racial, ethnic, and other axes of present conflict (and potential solidarity) within our pluralistic society, you have a lot of work to do. If you hope to use antidiscrimination law as a channel for liberatory practice, you are going to have to start pretty much from scratch.

So many things will be different in your world than they were in mine, when I was beginning my career. I can't presume to tell you what to do. So let me put it this way: here are five things I learned over the course of my organizing, lawyering, and teaching career that I wish we had known at the start. I hope they help you. I hope that they facilitate the development of your own emancipatory practice. In short, I just hope.

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*Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000) (discussing legal consciousness and rights mobilization).

128. See generally Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281 (2012) (describing the pernicious effects of mandatory pre-dispute arbitration on employment discrimination and consumer protection law).

129. Jean Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (suggesting that the proportion may be around twenty percent, but that the number was likely to increase) (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) (estimating that between fifteen and twenty-five percent of employers have instituted employment arbitration); THE 2014 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION (2014), <http://classactionsurvey.com/wp-content/uploads/2014/04/2014-class-action-survey.pdf> (estimating an increase in the use of employment arbitration)).

130. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

THE FIRST LESSON: IT'S ALL ABOUT THE MOVEMENT. It will seem paradoxical, but if you seek to use law as a channel of liberatory praxis, you must remember that the legal work you are doing is not really about the law, it is about the Movement. Without the Movement, it doesn't matter what the law says. Why? Because the law is a shameless plagiarist. It doesn't write its own material; it copies the ideas around it.<sup>131</sup> My dear friend and collaborator Lauren B. Edelman calls this tendency "legal endogeneity." It is a good term, and legal sociologists understand it immediately, but you get funny looks when you use it in mixed company. The idea is relatively straightforward, though—law absorbs the ideology and the institutionalized practices of the organizational field in which it functions. Law is not so much top down as it is bottom up.

The implications of this simple fact for social justice lawyering are profound. A social movement may succeed in enacting legislation—like Title VII—that is designed to transform unjust social norms, institutions and social meaning systems. But if after the law's enactment, the Movement loses momentum, if it cedes too much normative and rhetorical ground to pre-Movement norms, ideas, and practices, the law's transformative potential will be neutralized through blatant and subtle forms of legal capture. Once the social movement has waned, the norms, institutions, and social meaning systems it attempted to transform will simply reassert themselves through processes of statutory interpretation and enforcement.<sup>132</sup>

In this way, as the Women's Movement of the late 1960s and 70s dissipated over the course of the 1980s, the legal struggle against institutionalized forms of sexism by interpreting Title VII to require comparable worth compensation practices collapsed. Instead, Title VII's antidiscrimination principle was interpreted through the ideology of "free" market capitalism and formal equality. As the Movement faded, so too faded the hermeneutics of anti-subordination and women's liberation. In such a regressive discursive environment, then-Ninth Circuit Judge Kennedy's statement that "[n]either law nor logic could deem the free market system a suspect enterprise"<sup>133</sup> seemed to many, unremarkable.

In similar counter-revolutionary fashion, over the 1980s, consciousness raising groups and unlearning sexism workshops yielded to corporate diversity and sexual harassment trainings, which soon came to serve as affirmative defenses to sexual harassment lawsuits. Sexual harassment

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131. EDELMAN, *WORKING LAW*, *supra* note 11, at 12.

132. See Krieger, *Sociolegal Backlash*, *supra* note 7, at 347–351 (describing various ways in which laws designed to effect social change may be "captured" to restore and reinforce pre-existing norms, institutions, and social meaning systems and legal capture in relation to the Americans with Disabilities Act during the 1990s and early 2000s); Krieger, *The Burdens of Equality*, *supra* note 7, at 89–92.

133. *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985).

became a kind of sexual “tort,” torn completely from its roots in a theory of women’s liberation.<sup>134</sup>

To understand what happened to Title VII, is it crucial to distinguish between laws that reinforce existing social norms, institutions, and social meanings, and laws calculated to destabilize, displace, and transform them.”<sup>135</sup> Law of the first type—what in earlier work I called “normal law”<sup>136</sup>—is reinforced by the entrenched cultural arrangements with which it coheres. As legal actors interpret and apply normal law, they draw on established social norms, institutionalized practices, and social meanings in ways that mutually reinforce both the law and the informal social norms the law mirrors.

Transformative law, however—i.e., law that is designed to transform existing social norms, social meanings, and institutions—is far more vulnerable to processes of capture and retrenchment. The formal displacement of a network of entrenched norms and practices by a transformative statutory scheme does not guarantee the network’s demise. Through myriad means, those pre-existing norms and practices and the ideologies that reinforce them displace the new legal rules. Unless the social movement that enabled the law’s enactment remains vibrant and influential in shaping thought and behavior, pre-movement institutions, norms, and social meaning systems will reassert themselves, shifting transformative law into captured law.<sup>137</sup>

When the movements for racial and gender liberation were vibrant, Title VII law absorbed many of those movements’ ideas—like the idea that racial bias was ubiquitous in American society,<sup>138</sup> the idea that discrimination is a

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134. See CATHERINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Vicki Schulz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (critiquing the desire/dominance paradigm in which feminist anti-harassment theory had originated and illustrating just how far Title VII’s sexual harassment doctrine had drifted away from its early moorings in theories of women’s liberation).

135. See Krieger, *Burdens of Equality*, *supra* note 7, at 89; Krieger, *Sociolegal Backlash*, *supra* note 7, at 431–32.

136. *Id.*

137. See EDELMAN, *WORKING LAW*, *supra* note 11 (illuminating these processes through the theory of socio-legal endogeneity, and demonstrating how corporate ideology transformed federal employment discrimination doctrine from a system originally designed to alter organizational practices in the service of gender, age, and racial equality to one that not only accommodated, but further reinforced pre-existing corporate interests, values, and practices).

138. In earlier work, I referred to this phenomenon as the “presumption of invidiousness,” the notion that discrimination, though hidden, was common in American labor markets. During Title VII’s first two decades, the presumption effectively underpinned proof structures in disparate treatment cases. But as this earlier work describes, as federal judges during the 1980s ceased to believe that racial bias was prevalent in American society, the presumption’s influence waned, creating a much more hostile doctrinal environment for Title VII plaintiffs. Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, STAN. L. REV. 1161, 1177–81 (1995).

group harm, not just an individual harm<sup>139</sup> the idea that racial integration is important,<sup>140</sup> or that race, gender, and other forms of bias can be structural and institutionalized.

These movement-generated ideas gave Title VII law the presumption of discrimination arising from the establishment of a *prima facie* case;<sup>141</sup> the pattern and practice class action;<sup>142</sup> affirmative action,<sup>143</sup> disparate impact theory,<sup>144</sup> and hostile work environment harassment as a sex discrimination problem.<sup>145</sup> When the Movement was vibrant and creative, its ideas influential, law absorbed and reified them and thereby became a channel for emancipatory practice. Title VII stopped being a force for emancipatory practice because the Movement faded, and so the Movement's ideas, previously plagiarized by law and incorporated into Title VII doctrines and practices, faded as well.

As these ideas and the Movement that spawned them faded, the law plagiarized other ideas—like the idea that Title VII had nothing to do with integration but rather with “equal opportunity”<sup>146</sup> that could be squandered and that didn't guarantee equality of results; the idea that racist, sexist, and ageist attitudes were rare; the idea that Title VII violations were just another type of individualized intentional tort—minus the doctrine of constructive intent. With the demise of the civil rights and women's movements and the rise of “diversity culture,” all that was left for the courts to plagiarize were

139. See *Jamison v. Olga Coal Co.*, 335 F. Supp. 454, 467 (S.D.W. Va. 1971) (noting that in regards to the suitability of Title VII cases for class action treatment, federal courts in the early 1970s frequently stated, “it has been almost universally recognized that suits charging racial discrimination are, by their very nature, class suits inasmuch as the alleged misconduct, by definition, is directed toward a particular class of people . . .”).

140. Compare *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (upholding a voluntary affirmative action plan that used a 2-1 black/white hiring scheme to “eliminate patterns of racial segregation”), with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (opining that a history of societal discrimination is insufficient to justify the use of a racial classification to eliminate segregation).

141. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (explaining the presumption of discrimination underlying the pretext model of disparate treatment proof as, “A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. (citation omitted) And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.”).

142. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

143. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

144. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

145. The earliest Title VII case recognizing the creation of a hostile work environment as potentially actionable under Title VII was a national origin discrimination case, in which a Latina (then called “Spanish Surnamed American”) employee of a Texas optometrist filed a charge with the EEOC alleging that her work environment was rendered hostile by her employer's practice of segregating patients by race. *Rogers v. EEOC*, 454 F.2d 234 (1971).

146. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

symbolic compliance structures<sup>147</sup> and tropes about judicial non-interference with employer business judgments.<sup>148</sup>

The Movement may have waned, but the rhetoric of “managerial logic”<sup>149</sup> did not. Market economics and managerial logics *are* the new Movement, if not the new national religion.<sup>150</sup> So, the law now plagiarizes from this new Movement, stripping Title VII of its emancipatory potential and turning it into “captured law.”<sup>151</sup> If you want to rebuild civil rights law, you will first have to rebuild the kinds of broad, influential social movements that led to the original enactment of the 1963 Equal Pay Act, the 1964 Civil Rights Act, and the 1973 Age Discrimination in Employment Act. Build these movements and sustain them. If you let them wane, as we let the women’s movement and the African American civil rights movements wane in the 1980s and 1990s, opposing forces and interests will quickly fill the empty space, and the law will absorb their norms, their institutions, their social meaning systems, and their ideas instead of yours.

THE SECOND LESSON: LAW AND EQUITY. It is dangerous to make employment discrimination cases about legal, as opposed to equitable, remedies. It is dangerous to focus on compensatory and punitive damages rather than structural injunctions, back pay, and reasonable attorneys’ fees. When employment discrimination cases start being about big money, they start looking more like issues of private law—like torts—and less like issues of public law. Once employment discrimination cases are issues of private law, there is less reason to subsidize or otherwise facilitate their access to the legal system. Canons of liberal statutory construction, fee-shifting arrangements, procedural devices to facilitate decisions on the merits, and

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147. See Edelman et al., *When Organizations Rule*, *supra* note 20 (demonstrating based on a large empirical study of federal equal employment cases decided between 1964 and 1999 that, over time, federal judges increasingly drew inferences of non-discrimination from mere symbolic compliance structures, like anti-discrimination policies, diversity training, and grievance procedures, even without evidence that such structures were in any way effective in reducing discrimination).

148. *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1203 (11th Cir. 2013) (finding a common judicial formulation, “Title VII is not designed to make federal courts sit as a super-personnel department that reexamines an entity’s business decisions”) (quoting *Davis v. Town of Lake Park*, 245 F.3d 1232, 1244 (11th Cir. 2011)). As Lauren Edelman has empirically demonstrated, the percentage of federal district court decisions issued between 1983 and 2013 that contained the phrase “super-personnel department” increased from approximately two percent in 1983, the year the phrase first appeared, and just under 25 percent in 2013. EDELMAN, *WORKING LAW*, *supra* note 11, at 192.

149. EDELMAN, *WORKING LAW*, *supra* note 11, at 23 (defining “managerial logic” as centering on “market rationality, organizational efficiency, and managerial control,” and holding that business managers “have legitimate authority to set workplace rules, to control workers, and to resolve disputes that arise within organizations”).

150. This is not just tongue-in-cheek. See generally HARVEY COX, *THE MARKET AS GOD* (2016) (Tracing the deification of market forces and arguing that the ideologies, mythologies, rituals and symbols bound together in “free” market economics can best be understood as a religion).

151. Krieger, *Sociolegal Backlash*, *supra* note 7, at 347–57.

judicial oversight and enforcement of structural injunctions claim little warrant on judicial policy where private law is concerned.

In retrospect, I really do think that the transformative potential of Title VII was damaged by the 1991 amendments providing for compensatory and punitive damages. That change created the expectation that plaintiffs' attorneys could be paid through contingency arrangements, just as other "personal injury" lawyers are paid. Equitable remedies—especially structural injunctions that established utilization goals for underrepresented minorities and women, timetables for meeting those goals, and injunctions that required employers to identify and remove barriers to minorities' and women's inclusion—did much more to integrate American labor markets than high-value monetary awards to individual plaintiffs. There is no empirical evidence that being an unsuccessful defendant in a high-recovery individual discrimination case changes employer practices and encourages labor market integration. But there is ample empirical evidence of the efficacy of under-utilization analysis, goals and timetables, and affirmative action plans.<sup>152</sup>

So, when you revive the employment discrimination laws, don't allow them to be about large monetary awards to individual proven victims of discrimination. No matter how much you want to punish "evildoers," resist the temptation. Move beyond reproach. Make civil rights litigation about changing the institutionalized structures and practices that exclude or check members of subordinated groups. Focus on factors that facilitate the mobilization of law. Focus on the development of legal consciousness in subordinated communities. And don't forget to provide a way to fairly pay the plaintiff's lawyers that fight for and monitor structural injunctions, lest those lawyers be unable to pay their bills, and disappear.

THE THIRD LESSON: DE-EMPHASIZE THE INDIVIDUAL. Do not rely on the adjudication of individual disparate treatment claims to effectuate civil rights policy. Empirical social psychology has shown us that people are extremely poor at identifying discrimination from individual cases.<sup>153</sup> One needs information about broad patterns of treatment to detect discrimination. The very same biases that cause discrimination in the first place inevitably bias antidiscrimination adjudications. It is a closed system. The same types of people who are doing the discriminating in the workplace are deciding in the courtroom whether discrimination has occurred.

Relying on individual disparate treatment cases also doesn't work at least in part because, as sociologists have shown us, for a wide variety of reasons, individual victims of discrimination tend not to mobilize their legal

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152. Krieger, *supra* note 15, at 305–06.

153. See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1302–29 (1998); Krieger, *supra* note 15, at 296–299.

rights.<sup>154</sup> And if they do, unless they are represented by repeat players who play for the rules and not just for a single outcome, they will, as “one-shotters,” lose over the long haul, as the arc of substantive law and the procedural rules through which law is mobilized bend not so much toward justice, as they do toward repeat players.<sup>155</sup>

Using government procurement policy, utilization analysis, and goals and timetables for remedying underrepresentation of subordinated groups in labor market sectors in which they are or could become qualified is far more effective in integrating the labor market than waiting for members of those groups to bring—and win or favorably settle—antidiscrimination lawsuits. Affirmative action, not individual disparate treatment cases, integrated the American labor market in the 1960s and 1970s. If those labor markets are to be reintegrated, after all the damage that has been done, it will be through the same means.

THE FOURTH LESSON: AGAINST CONFIDENTIALITY.<sup>156</sup> For employment discrimination litigation to reemerge as a tool for labor market integration and thereby for ethnic, gender, and racial liberation, public law must be made public again. Presently, almost all the EEO enforcement activity in the United States is cloaked behind some veil of confidentiality. The identities of employers against whom charges of discrimination are filed with the EEOC are confidential. EEO-1 reports are confidential. The terms of virtually all settlements of EEO disputes are confidential.<sup>157</sup> Outside rare exceptions, arbitration decisions and arbitration awards are confidential. At this point, we simply do not know what is happening with civil dispute resolution in our country, not just in EEO law, but in many public law areas.<sup>158</sup>

I know I said I would refrain from giving you any advice, but I’m going to break that promise here—my advice is that important. End forced

154. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988). See also Laura B. Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL L. STUDIES 175 (2010); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC’Y REV. 33 (1999); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 285 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

155. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 75 (1974); Catherine R. Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869 (1999) (applying Galanter’s repeat player/one shotter framework to litigation in general and to EEO litigation in particular).

156. The message here echoes Owen Fiss, who in the early 1980s warned that confidential settlements would damage, if not ultimately destroy, public law. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

157. The ubiquity and policy problems presented by confidentiality mandates in employment discrimination settlement agreements is thoroughly developed in Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006).

158. Miriam Gilles, *The Day Doctrine Died*, *supra* note 130, at 142–43.



arbitration. Until that can be accomplished (and it will have to be accomplished through an act of Congress or the reversal of numerous Supreme Court precedents, which will be hard), use every state contract law doctrine at your disposal to limit its reach.

So long as forced arbitration is still permitted, then force its results to be made public. Pass state laws that require all arbitration decisions to be written and available to anyone who wants to read them. Any time a court is used to stay a suit pending arbitration, or to enforce an arbitration decision, or to deem a claim resolved in an arbitral forum *res judicata*, require that the documents filed in the course of that arbitration be made publicly available on the same terms that they would have been available had the matter been litigated in court.

Like other forms of public law, employment discrimination law is a public resource. As the Supreme Court once acknowledged, a civil rights suit is “more than a private tort suit benefiting only the individual plaintiffs.”<sup>159</sup> There is a place in our society for confidential arbitration, but it is *not* in the realm of public law, where our fundamental rights are defined and vindicated and our institutions formed and reformed.

### III.

#### BY WAY OF CONCLUSION: THE FIFTH AND MOST IMPORTANT LESSON OF ALL

What stays with me so strongly about Ricky Sherover-Marcuse’s *Unlearning Racism* work is the way she could evoke and encourage a powerfully motivating sense of solidarity among people of profoundly different social identities and locations. To be sure, she called us to uncover the ways in which racism and other division-inducing ideologies had been cemented into our collective institutions and woven into our subjective thoughts and feelings. But this critical/self-critical work was not an end in itself. Its purpose was ultimately reconstructive, to develop an emancipatory consciousness that would individually and collectively free us from fear and open us to revolutionary action.<sup>160</sup>

Sherover-Marcuse was a Marxist—a highly capable, theoretical Marxist, as *Emancipation & Consciousness* illustrates. For her, the *telos* of the struggle against racism and similar, divisive ideologies was not to ensure that members of previously excluded groups would have an equal opportunity to join the economic elite. It was that we should understand how these ideologies operated to protect capitalism and ensnare human aspirations toward distributive solidarity.

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159. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

160. SHEROVER-MARCUSE, *EMANCIPATION & CONSCIOUSNESS*, *supra* note 1, at 1–2.

As I said at the outset, the Marxist study group, the Title VII study group, and Sherover-Marcuse's Unlearning Racism workshops were, in my mind, part of the same struggle. But I now see it was more. The Title VII study group couldn't do its work effectively unless the Marxist study group kept meeting. The same dynamic played out nationwide. For civil rights policy to advance, the communist countries—the Soviet Union, Cuba, and China, primarily—and European democratic socialist countries like Sweden had to keep battling the capitalist west for the hearts and minds of the world's working and middle classes. But they did not. The Soviet Union collapsed, dragging Cuba into poverty, and China started down the capitalist road. By the 1990s, freed from any viable alternative to unfettered capitalism nipping at its heels, American neoliberalism began shedding its commitment to norms of distributive justice, marching inexorably toward the new Gilded Age in which we find ourselves now.

Beginning in the 1980s, as progress previously made on civil rights began eroding in the United States, so too began eroding what had seemed broadly shared, if modest, norms of basic distributive justice. As a grandchild of the New Deal and a child of the Great Society, it did not occur to me in my youth that the War on Poverty might be a national historical aberration.

Before Reagan was President, the fact that labor wielded power commensurate with managerial interests in electoral politics seemed to me unremarkable. Of course, I thought, labor should have as strong a voice as management in the political process. That was not only the economic equivalent of political checks and balances, and as such fundamentally American, it also seemed to me and almost everyone I knew a basic requisite of distributive justice. That justice required periodic redistribution of wealth did not seem a radical idea; one could hear it advocated in churches and synagogues as easily as in the streets. That distributive justice held some moral claim on the country's tax code, on wage and hour laws, on how the nation organized health care—these ideas were relatively uncontroversial before the Reagan Presidency, except on the far right. People disagreed about the optimal degrees of redistribution, to be sure, but most people did not disagree about the need, let alone the morality, of redistribution itself.

But now, advocating even the mildest forms of redistribution draws accusations of class warfare. It is not only politically ineffective but morally suspect to claim that poverty is a symptom of injustice, that people are not poor because they deserve to be poor or rich because they deserve to be rich. How did things come to this?

With the demise of communism abroad and the eclipsing of progressive religion by an alienating strain of social, political, and economic conservatism in religiously-inflected political discourse, what remained of the American left had no effective moral language in which to advocate for redistributive policies. At the same time and for the same reasons, the

growing center and the even faster-growing right felt no need to reduce increasing levels of economic inequality in American society. Gradually, the leveling impulse on the left gravitated away from class and lighted on other dimensions of social division—race, gender, sexual orientation, disability, and intersections of these. Discourses of class consciousness faded, and with them, strong, normatively grounded calls for redistributive programs and policies. With time, little more than the antidiscrimination principle remained.

But the antidiscrimination principle cannot do the work of distributive justice.

Antidiscrimination law can't liberate someone who was denied an education adequate to prepare them for the twenty-first-century labor market. Antidiscrimination law can't liberate someone who can't work because they have a chronic illness and no access to health care.

I have no citation to offer for the following story, because I heard it at a workshop on affirmative action programs in India, Brazil, and the United States, and, to my knowledge, it has never been published. Kimberlé Crenshaw, a participant in the workshop, was speaking about antidiscrimination laws, and she observed that they tend to benefit the most fortunate members of any group they protect. To illustrate her point, she analogized Title VII to a hole in the ceiling separating a dank basement, filled with desperate dispossessed people piled high upon each other, from a well-lit room above, where much better-off people were conversing and eating dinner. In such a situation, she pointed out, it was only the very few at the very top of the pile in the basement who would be able to crawl through the hole to the well-lit room above. She was right. Antidiscrimination laws can usually help only the best-off of any subordinated group. Antidiscrimination laws don't demand that we ask, why are some people in the basement at all, while others dine upstairs?

Perhaps Professor Peter Westen hit the nail on the head when he called equality an "empty idea."<sup>161</sup> Of an equal right, one must always ask, "Equal to what?" An equal right to poverty isn't much of a right at all. There must be a right to a decent education before there can be an equal right to a decent education. There must be a right to health care before there can be an equal right to health care. There must be a right to housing before there can be an equal right to housing. The same is true of a right to equal employment opportunity. Such a right means little in an atomized "gig" economic system, where capital consolidates but workers cannot, where the educational system fails to prepare non-elite young people for work that will pay for decent housing, health care, childrearing, and retirement.

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161. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

I am just a lawyer, and I would be swimming far out of my depth to opine on matters of political theory. I cannot contribute in any meaningful way to scholarly debates about the relative merits or demerits of rights. But I did learn something from Ricky Sherover-Marcuse and from my forty-some years litigating, teaching, and writing on antidiscrimination law. It is this: racism and other division-sowing ideologies exist because they serve the interests of the economically and politically powerful. These ideologies divert people's attention from the material conditions of their subordination, making them easier to manipulate and control. They can be used to crush coalitions before they even form by pitting subgroups of the disempowered against each other. They accomplish these goals most effectively under conditions of widespread objective and subjective insecurity. But their kryptonite is the creation of an empathetic, superordinate sense of "us-ness." It is the identification of a common struggle—a common enemy, even—that turns the many into the one.

If the national experiment is to amount to anything beyond the sequelae of American slavery and genocide, you are going to have to build a new, more just sense of American "us-ness," than has ever been created before, and you will have to weave that "us-ness" into new nation-constituting texts, institutions, symbols, and rituals. I hope that Title VII—this good law, or some variant of it—will be a part of that future, and that it will fare better under your stewardship than it did under ours.

But perhaps it will fare better if you expect less from it than we did. Before you revive equal rights, establish human rights, not only human rights to education, employment, housing, health care. As importantly, establish rights that never have to be claimed, by building a society where all its members, and those who sojourn within it, live in communities that nurture them, that give meaning to their lives, and that give them both the impulse and the opportunity to contribute self-consciously to the greater collective good.